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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GEORGE LEASURE and AMY
LEASURE,

Plaintiffs,

vs.

WILLMARK COMMUNITIES, INC.
and ALPINE CREEKSIDE, INC.,

Defendants.

CASE NO. 11-CV-00443 BEN (DHB)

ORDER:

**(1) GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT [Docket No. 38]**

**(2) DENYING PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT [Docket
No. 50]**

**(3) DENYING AS MOOT MOTION
TO EXCLUDE IMPROPER
EXPERT TESTIMONY AND FOR
RULE 37 SANCTIONS [Docket No.
52]**

Presently before the Court is Defendants' Motion for Summary Judgment (Docket No. 38), Plaintiffs' Motion for Partial Summary Judgment (Docket No. 50), and Defendants' Motion to Exclude Improper Expert Testimony and for Rule 37 Sanctions (Docket No. 52). For the reasons stated below, Defendants' Motion for Summary Judgment is **GRANTED**, Plaintiffs' Motion for Partial Summary Judgment is **DENIED**, and Defendants' Motion to Exclude Improper Testimony and for Rule 37 Sanctions is **DENIED AS MOOT**.

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BACKGROUND

Plaintiffs George and Amy Leasure formerly resided at Creekside Meadows, located at 1750 Arnold Way, Alpine, CA 91901. (Teague Decl., Exh. A.) "Creekside Meadows" is a brand name for a family of apartment complexes managed and maintained by Defendant Willmark Communities. Both Creekside Meadows and Willmark Communities are owned and operated by a single individual, Mark Schmidt. (Schmidt Decl. ¶ 2.) Defendant Alpine Creekside, doing business as Creekside Meadows, holds title to Creekside Meadows. (Teague Decl., Exh. A.) Alpine Creekside maintains a fictitious business name for "Creekside Meadows" on file with the San Diego County Recorder. (*Id.*)

The Residential Lease Agreement used by Willmark Communities identifies the owner of the property as Alpine Creekside, and indicates that Willmark Communities acts as the owner's agent. (Peel Decl., Exh. B.) This information is provided to tenants so that they are aware of the actual entities who own and manage the property, but tenants do not interact with their landlord via its full corporate title except via the name of the community where they reside. For example, the Leasures wrote their rent checks to "Creekside Meadows" and all correspondence with the Leasures utilized that name. (Schmidt Decl. ¶ 3; Peel Decl. ¶ 4.)

On September 18, 2009, Plaintiffs moved into the apartment located at 1750 Arnold Way, Unit 14, Alpine, CA 91901, located in Building 17 of Creekside Meadows. (Ruiz Decl. ¶ 2.) The Residential Lease Agreement was executed on September 12, 2009, with a term of 16 months and 13 days. (Peel Decl., Exh. B; Smith Decl. ¶ 6.) The base rent for the apartment was \$980 per month, and there was a concession for on-time payments that permitted rental payments of \$895. (Peel Decl., Exh. B.) After moving into this apartment, Plaintiffs indicated that they wished to move from the upstairs apartment to a downstairs one. (Smith Decl. ¶ 5.) Plaintiffs were put on a wait list for a downstairs apartment. (*Id.*)

A new computer program re-categorized Plaintiffs' Lease as an annual lease and

1 issued a premature renewal lease on August 31, 2010, which incorrectly listed the
2 Lease as expiring on October 31, 2010. (Ruiz Decl. ¶ 6.) The Leasures decided to
3 vacate their apartment by the end of October 2010, relying on the renewal letter. (See
4 Peel Decl., Exh. F.) An initial final account statement was issued on November 22,
5 2010, which treated the move out as a breach of the Lease and included accelerated rent
6 through January 2011 and late fees, for a total account balance of \$4,917.05. (*Id.*, Exh.
7 G.) The account statement included a cover letter addressed to Ms. Leasure, which
8 stated: "This communication is for the purpose of a debt collection account *we own*.
9 This is an attempt to collect a debt. Any information will be used for that purpose."
10 (*Id.* (emphasis added).)

11 On December 7, 2010, Mr. Leasure called Defendants and notified them of the
12 error and the premature renewal letter. (Ruiz Decl. ¶ 4.) The account was placed under
13 review. The error was acknowledged, a credit of \$4,278.50 was issued to the Leasures,
14 and a revised account statement was issued on December 7, 2010. (*Id.* ¶¶ 5-10; Peel
15 Decl., Exh. J.) This revised account statement stated that Ms. Leasure had an
16 outstanding balance of \$638.55. (Peel Decl., Exh. J.) On January 14, 2011, Creekside
17 Meadows sent Ms. Leasure a letter, reminding her that she had an outstanding balance
18 of \$638.55. (Christison Decl., at 143.) On March 9, 2011, Creekside Meadows sent
19 Ms. Leasure a final notice, once again stating that Ms. Leasure had an outstanding
20 balance of \$638.55. (*Id.* at 144.)

21 Plaintiffs filed suit on March 3, 2011. (Docket No. 1.) The Complaint alleges:
22 (1) violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692,
23 *et seq.*; (2) violations of the California Rosenthal Act, CAL. CIV. CODE §§ 1788-
24 1788.33; (3) fraud; and (4) bad faith retention of security deposit. (*Id.*)

25 Presently before the Court is Defendants' Motion for Summary Judgment
26 (Docket No. 38), Plaintiffs' Motion for Partial Summary Judgment (Docket No. 50),
27 and Defendants' Motion to Exclude Improper Expert Testimony and for Rule 37
28

Sanctions (Docket No. 52).¹

DISCUSSION

I. MOTIONS FOR SUMMARY JUDGMENT

Summary judgment must be granted where the record shows “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party must “persuade the court that there is no genuine issue of material fact.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

Defendants seek summary judgment on all claims,² and Plaintiffs seek summary judgment on the first and second claims. The Court will consider the two motions for summary judgment together.

A. Claim 1: Violations of the FDCPA

Plaintiffs’ first claim alleges violations of the FDCPA, 15 U.S.C. §§ 1692 *et seq.* Both Plaintiffs and Defendants move for summary judgment on this claim.

To establish a prima facie case for violation of the FDCPA, a plaintiff must plead

¹ Defendants filed evidentiary objections to the Declaration of Stephen G. Recordon. (Docket No. 42.) As the Court does not rely on the Recordon Declaration in reaching its disposition, Defendants’ objections are **OVERRULED** as moot.

² First, Plaintiffs argue that Defendants’ summary judgment motion is premature. According to Plaintiffs, the motion was scheduled to foreclose the depositions of Mark Schmidt, Cindy Peel, and Rita Ruiz—Defendants’ primary witnesses. Because these three witnesses’ knowledge forms the factual basis for Defendants’ defense that they neither regularly nor principally collect debts, Plaintiffs argue, it is premature to conclude that no triable issue of fact remains in regards to the claims for violations of the FDCPA and Rosenthal Act.

If a party claims it needs additional time to adequately oppose a motion for summary judgment, that party must explain, by affidavit or declaration, its inability to provide opposing declarations, what facts are sought, and how those facts are reasonably expected to create a triable issue. *See Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989); *see also* FED. R. CIV. P. 56(d) (“If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: . . . allow time to obtain affidavits or declarations or to take discovery.”). Plaintiffs, however, failed to seek additional time under Rule 56(d). In addition, Plaintiffs filed their Motion for Partial Summary Judgment, which the Court considers here, after discovery had closed.

1 and prove four elements: (1) the plaintiff is any natural person who is harmed by
 2 violations of the FDCPA, or is a “consumer” within the meaning of 15 U.S.C.
 3 §§ 1692a(3) and 1692c(d) for purposes of a cause of action pursuant to 15 U.S.C.
 4 § 1692c or 15 U.S.C. § 1692e(11); (2) the “debt” arises out of a transaction entered into
 5 primarily for personal, family, or household purposes, 15 U.S.C. § 1692a(5); (3) the
 6 defendant collecting the debt is a “debt collector” within the meaning of 15 U.S.C.
 7 § 1692a(6); and (4) the defendant has violated, by act or omission, a provision of the
 8 FDCPA, 15 U.S.C. §§ 1692a-1692o.

9 Plaintiff has not established a prima facie case for violation of the FDCPA,
 10 because the third element is not met. The FDCPA expressly regulates only “debt
 11 collectors.” *See Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1060-61 (9th Cir.
 12 2011). In order to assert direct liability under the FDCPA, a plaintiff must show that
 13 the defendant’s actions or status render it a “debt collector” for purposes of the Act.
 14 *See Heintz v. Jenkins*, 514 U.S. 291, 292 (1995); *Fox v. Citicorp Credit Servs., Inc.*, 15
 15 F.3d 1507, 1513 (9th Cir. 1994).

16 The FDCPA defines “debt collector” as:

17 *any person who uses any instrumentality of interstate commerce or the*
 18 *mails in any business the principal purpose of which is the collection of*
 19 *any debts, or who regularly collects or attempts to collect, directly or*
 20 *indirectly, debts owed or due or asserted to be owed or due another.*
 21 Notwithstanding the exclusion provided by clause (F) of the last
 22 sentence of this paragraph, the term includes any creditor who, in the
 23 process of collecting his own debts, uses any name other than his own
 24 which would indicate that a third person is collecting or attempting to
 25 collect such debts. . . . The term does not include—

26 (F) any person collecting or attempting to collect any debt owed or due
 27 or asserted to be owed or due another to the extent such activity (i) is
 28 incidental to a bona fide fiduciary obligation or a bona fide escrow
 arrangement; (ii) concerns a debt which was originated by such person;
 (iii) concerns a debt which was not in default at the time it was obtained
 by such person; or (iv) concerns a debt obtained by such person as a
 secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6).

Here, Defendants are not debt collectors for several reasons. First, Defendants

1 attempted to collect a debt that they originated, as the debt was originated by the parties
2 in course of their relationship through the lease.

3 Second, no debt was in default prior its acquisition. In *De Dios v. International*
4 *Realty & Investments*, 641 F.3d 1071, 1074 (9th Cir. 2011), the Ninth Circuit held that
5 the exemption under 15 U.S.C. § 1692a(6)(F)(iii) applied where a manager was
6 retained to collect rent before it was considered to be in default. Here, Willmark
7 Communities was similarly provided with authority to collect rent and expenses when
8 they were not yet in default on behalf of Alpine Creekside.

9 Moreover, Willmark Communities is entitled to use the "Creekside Meadows"
10 business name. A creditor does not fall within the "uses any name other than his own"
11 exception in 15 U.S.C. § 1692a(6) unless the creditor uses a pseudonym or alias "which
12 would indicate that a third person is collecting or attempting to collect" the debt.
13 *Friedman v. Rubinstein*, No. 97 C 6610, 1997 WL 757875, at *3 (N.D. Ill. 1997).
14 Creditors may collect their debts under names other than their own as long as they have
15 consistently dealt with their debtors under the other name, so as not to mislead their
16 debtors as to whom is attempting to collect such debts. See *Dickenson v. Townside*
17 *T.V. & Appliance, Inc.*, 770 F. Supp. 1122, 1128 (S.D. W. Va. 1990). Here, Willmark
18 Communities relied on the services of its affiliated management entity to issue account
19 statements for mailing to tenants. The lease identified the full corporate names of the
20 owner and its agent and all cover letters for the account states expressly that the debt
21 remained owned by the originator.

22 Accordingly, Defendants' motion for summary judgment as to the first claim is
23 **GRANTED** and Plaintiffs' motion for summary judgment as to the first claim is
24 **DENIED**.

25 **B. Claim 2: Violations of the California Rosenthal Act**

26 Plaintiffs' second claim alleges violations of the California Rosenthal Act, CAL.
27 CIV. CODE §§ 1788-1788.33. Both Plaintiffs and Defendants move for summary
28 judgment on the second claim.

1 The Rosenthal Act governs the collection of “consumer debts” by “debt
2 collectors.” CAL. CIV. CODE §§ 1788.2(c), 1788.2(f). “Consumer debt” is defined as
3 “money, property or their equivalent, due or owing or alleged to be due or owing from
4 a natural person by reason of a consumer credit transaction.” CAL. CIV. CODE
5 § 1788.2(f). A “consumer credit transaction,” in turn, is defined as “a transaction
6 between a natural person and another person in which property, services or money is
7 *acquired on credit* by that natural person from such other person primarily for personal,
8 family, or household purposes.” CAL. CIV. CODE § 1788.2(e) (emphasis added).

9 “Debt collection” under the Rosenthal Act, therefore, requires a “consumer credit
10 transaction” which in turn requires the extension of credit. The Court is not aware of
11 any cases holding that rent collection equates to “debt collection” or that rent involves
12 a “consumer credit transaction” under the Rosenthal Act. Plaintiffs have not
13 established that Creekside Meadows, as a landlord, extends credit to tenants. *See Sanai*
14 *v. U.D. Registry, Inc.*, No. B170618, 2005 WL 361327, at *16 (Cal. App. 2d Dist. Feb.
15 16, 2005) (a month-to-month tenancy was not a “consumer credit transaction” and
16 unpaid rent was not a “consumer debt”). Accordingly, Plaintiffs have not established
17 that Creekside Meadows engaged in the collection of a consumer debt for the purposes
18 of the Rosenthal Act.

19 Accordingly, Defendants’ motion for summary judgment as to the second claim
20 is **GRANTED** and Plaintiffs’ motion for summary judgment as to the second claim is
21 **DENIED**.

22 C. Claim 3: Fraud

23 Plaintiffs’ third claim alleges fraud. Plaintiffs allege that they originally
24 requested to rent a first-floor apartment. (Compl. ¶ 7.) According to Plaintiffs, “[i]n
25 order to induce Plaintiffs to rent the apartment, Defendants represented no first-floor
26 apartment was currently available but that Plaintiffs would receive the next such unit
27 and could move there at no extra charge. In reliance on this representation Plaintiffs
28 rented the apartment.” (*Id.*) Defendants move for summary judgment on this claim.

1 Plaintiffs do not oppose summary judgment on this claim.

2 Tortious fraud or deceit occurs when a party “willfully deceives another with
3 intent to induce him to alter his position to his injury or risk.” CAL. CIV. CODE § 1709.
4 The elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) intent to
5 defraud; (4) justifiable reliance; and (5) resulting damage. 5 B.E. WITKIN, SUMMARY
6 OF CALIFORNIA LAW § 772 (10th ed. 2012).

7 The Court will consider whether there has been a misrepresentation. For a
8 misrepresentation to exist, a defendant must have made a representation consisting of
9 one of the following: “1. The suggestion, as a fact, of that which is not true, by one who
10 does not believe it to be true; 2. The assertion, as a fact, of that which is not true, by
11 one who has no reasonable ground for believing it to be true; 3. The suppression of a
12 fact, by one who is bound to disclose it, or who gives information of other facts which
13 are likely to mislead for want of communication of that fact; or 4. A promise, made
14 without any intention of performing it.” CAL. CIV. CODE § 1710.

15 Here, no misrepresentation took place because a wait list did exist, and was
16 maintained on the premises by the staff. In addition, Plaintiffs were in fact placed on
17 the wait list at the time of their request. Kaitlin Smith testified:

18 a wait list I had created was already in existence [when the Leasures
19 requested to be moved to a downstairs apartment] and I informed them
20 that I could put them on the list but that no suitable downstairs
21 apartments were available for them at that time. I placed them on the
22 wait list behind at least three (3) other longer term residents who were
23 already on the list at that time.

24 (Smith Decl. ¶ 5.)

25 Plaintiffs do not submit any evidence to the contrary, nor do they oppose
26 summary judgment on this claim. Accordingly, Defendants’ motion for summary
27 judgment as to the third claim is **GRANTED**.

28 **D. Claim 4: Bad Faith Retention of Security Deposit**

Plaintiffs’ fourth claim alleges bad-faith retention of their security deposit.
Defendants move for summary judgment on this claim. Plaintiffs do not oppose

1 summary judgment on this claim.

2 According to California Civil Code § 1950.5(b):

3 As used in this section, "security" means any payment, fee, deposit, or
4 charge, including, but not limited to, any payment, fee, deposit, or
5 charge, except as provided in Section 1950.6, that is imposed at the
6 beginning of the tenancy to be used to reimburse the landlord for costs
7 associated with processing a new tenant or that is imposed as an advance
8 payment of rent, used or to be used for any purpose, including, but not
9 limited to, any of the following:

10 (1) The compensation of a landlord for a tenant's default in the
11 payment of rent.

12 (2) The repair of damages to the premises, exclusive of ordinary
13 wear and tear, caused by the tenant or by a guest or licensee of the tenant.

14 (3) The cleaning of the premises upon termination of the tenancy
15 necessary to return the unit to the same level of cleanliness it was in at
16 the inception of the tenancy.

17 Security deposits are subject to refund to the tenant at the termination of the tenancy,
18 after lawful deductions. CAL. CIV. CODE § 1950.5. When the deposit is security for the
19 tenant's payment of rent, cleaning of premises, or the repair of damages caused by the
20 tenant, the cost of these items may be deducted by the landlord from the deposit. CAL.
21 CIV. CODE § 1950.5(e). The landlord must deliver to the tenant a written itemized
22 statement of the amount of the deposit, its disposition, and the balance due the tenant.
23 CAL. CIV. CODE § 1950.5(f) & (g).

24 Here, the Residential Lease Agreement provided for payment of a security
25 deposit in the amount of \$99. (Peel Decl., Exh. B (Residential Lease Agr. § 7(a)).)
26 The Agreement also provided when the security deposit could be deducted against an
27 outstanding balance upon move-out:
28

Should Lessee comply with all the terms, covenants, and conditions of the
Lease to be performed by said Lessee and promptly pay all of the rent
provided for herein and all other sums payable by Lessee to Lessor
hereunder, the said security deposit shall be returned to Lessee upon
termination of the Lease. . . . UPON TERMINATION OF TENANCY,
LESSOR MAY CLAIM OF SUCH SECURITY DEPOSIT SUCH
AMOUNTS NECESSARY TO REMEDY DEFAULTS WITH RESPECT
TO PAYMENT OF RENT, REPAIR OF DAMAGE (INCLUDING
PAINT DAMAGE) TO EITHER THE APARTMENT, PERSONAL
PROPERTY OF LESSOR IF ANY, OR COMMON AREAS OF THE
APARTMENT COMMUNITY CAUSED BY THE LESSEE OR

1 HIS/HER GUEST, AND TO CLEAN THE APARTMENT (INCLUDING
2 ALL JANITORIAL, WINDOWS, WINDOW COVERINGS, AND
3 FLOOR COVERINGS) UPON TERMINATIONS. Said security deposit
shall not constitute a measure of Lessor's damages in the event of a
4 default.

5 (Id.)

6 Willmark Communities provided Ms. Leasure with a copy of an itemized
7 statement indicating the basis for and amount of any security received as well as the
8 disposition of that security. After Mr. Leasure called Willmark Communities,
9 Willmark Communities gave Ms. Leasure credits for the internal technical issue which
10 led to the incorrect renewal letter. Even after the credits were made, however, a
11 balance pursuant to the terms of the Lease was due and owing in excess of the security
12 deposit. Specifically, the statement showed that the Leasures had an outstanding
13 balance of \$737.55, which consisted of: (1) \$31.50 for one prorated day for rent for
14 November 1, 2010; (2) \$150.97 for unpaid utilities; (3) \$40 for carpet cleaning; (4)
15 \$490 for rent undercharge balance for November 2009 to November 2010; (5) \$15.08
16 for rent undercharge balance for September 2009; and (6) \$10 for touch-up paint and
17 supplies. (Ruiz Decl. ¶ 8; Peel Decl., Exh. G.) An audit of the final account statement
18 was later performed. The audit showed that the total due should have been \$552.72
19 pursuant to the lease agreement and credit for Defendants' policy of capping utilities
20 for tenants, which was not applied in the revised final account statement. When the
21 rental deposit was applied, the total balance due was \$453.75. (Ruiz Decl. ¶ 10.) No
22 balance was owed to the Leasures.

23 Accordingly, Defendants' motion for summary judgment as to the fourth claim
24 is **GRANTED**.

25 As the above issues are dispositive, the parties' remaining arguments will not be
26 addressed.

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1 **II. DEFENDANTS' MOTION TO EXCLUDE IMPROPER EXPERT TESTIMONY AND**
2 **FOR RULE 37 SANCTIONS**

3 Defendants move to exclude the Declaration of Richard Alter, filed in support
4 Plaintiffs' Motion for Partial Summary Judgment. In addition, Defendants request
5 sanctions under Federal Rule for Civil Procedure 37. Because the Court does not rely
6 on Alter's Declaration in the disposition of the Motion for Partial Summary Judgment,
7 the Motion to Exclude is **DENIED AS MOOT**.

8 **CONCLUSION**

9 For the reasons stated above, Defendants' Motion for Summary Judgment is
10 **GRANTED** and Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.
11 Summary judgment is granted in favor of Defendants on all claims.

12 Defendants' Motion to Exclude Improper Testimony and for Rule 37 Sanctions
13 is **DENIED AS MOOT**.

14 **IT IS SO ORDERED.**

15
16 DATED: March , 2013


HON. ROGER T. BENITEZ
United States District Judge